And he shows that the same rules are precisely applicable to night navigation, if the colored lights be adopted.

The rules thus suggested seem to us to have the requisites which rules should have. They are effectual, they are easily intelligible, and they are few. For the rest we refer the reader to Mr. Rothery's interesting *brochure*. We have read it ourselves with great satisfaction, and hope that it will receive in the proper quarter the consideration which it merits. It is a striking feature in the times, that a legal functionary like Mr. Rothery is not contented to discharge the arduous duties of his position honorably and well, but utilizes the opportunities which his office gives him, of benefiting his country by extracurial labors of importance to the commerce of the country and the lives of our countrymen.

RECENT AMERICAN DECISIONS.

Circuit Court of the United States for the District of New Jersey—September, 1857.

MILNOR *vs.* THE NEW JERSEY RAIL ROAD COMPANY ET AL.

SHARDLOW *vs.* THE SAME.

BIGELOW *vs.* THE SAME.

MILNOR *vs.* NEWARK PLANK ROAD COMPANY ET. AL.

SHARDLOW *vs.* THE SAME.

1. A court of the United States has no jurisdiction to restrain by injunction the erection of a bridge over a navigable river lying wholly within the limits of a particular State, where such erection is authorized by the legislature of the State, though a port of entry has been created by Congress above the bridge. Dicta in Devoe *vs.* Penrose Ferry Bridge Co. 3 Am. L. Reg. 83, overruled; and in Penna. *vs.* Wheeling Bridge Co. 13 How. 579, explained.

2. Construction of Acts of the legislature of New Jersey with regard to the proprietors of the bridges over the rivers Passaic and Hackensack, and the agreements made thereunder with respect to these rivers.

3. If such Acts and agreements give to the corporation a franchise or exclusive privilege of taking toll, and erecting a bridge on these rivers, that franchise or privilege may be taken by the legislature of the State, under its right of eminent domain, on providing compensation.

4. Such franchise or exclusive privilege, if it exists, is vested in the corporation at large and not in the individual members, and may be waived or relinquished by the action of a majority of the corporators.

5. The mere establishment of a particular line of road, and erection of a bridge in a particular location, in a town, by a railroad company, after a controversy with the inhabitants with respect thereto, does not amount to a contract so as to preclude the company, after a lapse of time, from changing the direction of their line and the position of the bridge.

These were several bills in equity, for injunctions and other relief, upon the facts and for the purposes set forth in the opinion below. Interlocutory injunctions had been granted, and now, September 22d, 1857, upon final hearing, and after a full argument, the opinion of the court was delivered by

GRIER, J.—The object of these five several bills is to obtain injunctions prohibiting the erection of certain bridges over the Passaic river. One of these is proposed to be erected at a point called the Commercial Dock, in the city of Newark, by the New Jersey Railroad and Transportation Company. The other, by the Newark Plank Road Company, near the mouth of the Passaic river and some two and a half miles below the wharves of the port of Newark. The erection of these bridges is authorized by the legislature of New Jersey. They are required to have pivot draws, leaving two passages of sixty-five feet each for the passage of vessels navigating the river or harbor. The first of these bridges is required in order to avoid certain curves in the railroad where it passes through Newark, and to make it straight. The other to accommodate the large and increasing commerce between the cities of New York and Newark, on the plank road connecting the lower end of Newark with Jersey City.

It will not be necessary to a proper consideration of the several questions affecting the decision of these cases, to give an abstract either of the pleadings or the testimony. Where opinions are received in evidence, there can be no restraint as to quantity. Such testimony is always affected by the feelings, prejudices and interests of the witnesses, and is of course contradictory. A skipper will pronounce every bridge a nuisance, while travelers on plank or railroads will not think it proper that their persons or pro-

perty should be subject to delay, or risk of destruction, to avoid an inconvenience or slight impediment to sloops and schooners; owners of wharves or docks who may apprehend that their interests may be affected by a change of location of a bridge, are unanimous in their opinion that public improvement had better be arrested than that their interests should be affected. In this conflict of testimony and discordant opinion, we shall not stop to make any invidious comparisons as to the credibility of the witnesses, but assume such facts as we believe to be proven, without attempting to vindicate the propriety of our assertions.

I. The first of the three great questions so ably discussed by the learned counsel in these cases, is briefly and lucidly stated in the following propositions, which complainants have endeavored to establish:

1st, "That the Passaic river is a public highway of commerce, which under the constitution of the United States has been regulated by Congress."

2d, "That the free navigation of the Passaic river as a common highway having been established by regulation of Congress, and by compact between the States, it cannot lawfully be obstructed by force of any State authority or legislation."

3d, "The bridges proposed to be erected by the New Jersey Railroad Company and Plank Road Company will be each an obstruction to the free navigation of the Passaic river, and public nuisances."

"Consequently this court will enjoin their erection, on complaint of any injured party."

So far as these propositions involve the facts of the case, we find them to be as follows:

The Passaic is a river having its springs and its outlet wholly within the State of New Jersey.

Though a small and narrow river, it is navigable for sloops, schooners, and the smaller classes of steamboats as far as the tide flows, some miles above Newark; at the upper end, and above this city there are several bridges, with small draws, and difficult to pass. These were all erected by authority of the State, and one

of them more than fifty years ago. The city of Newark has been made a port of entry by act of Congress, has some little foreign commerce, and some with ports of other States. Being in fact but a manufacturing suburb of New York, much the largest portion of her commerce is with that city, and carried on the rail and plank roads connecting them.

That the proposed bridges will in some measure cause an obstruction to the navigation of the river, and some inconvenience to vessels passing the draws, is certainly true. Every bridge may be said to be an obstruction in the channel of a river, but it is not necessarily a nuisance. Bridges are highways as necessary to the commerce and intercourse of the public as rivers. That which the public convenience imperatively demands, cannot be called a public nuisance because it causes some inconvenience or affects the private interests of a few individuals.

Now, if every bridge over a navigable river be not necessarily a nuisance, but may be erected for the public benefit, without being considered in law or in fact a nuisance, though certainly an inconvenience affecting the navigation of the river, the question recurs, who is to judge of this necessity? Who shall say what shall be the height of a pier, the width of a draw, and how it shall be erected, managed and controlled? Is this a matter of judicial discretion or legislative enactment? Can that be a nuisance which is authorized by law? Does a State lose the great police power of regulating her own highways and bridges over her own rivers, because the tide may flow therein, or as soon as they become a highway to a port of entry within her own borders? In the course of seventy years' practical construction of the Constitution, no act of Congress is to be found regulating such erections, or assuming to license a bridge, over such a river wholly within the jurisdiction of a State, (if we except the doubtful precedent of the Cumberland road) and during all this time States have assumed and exercised this power. If we now deny it to the States, where do we find any authority in the Constitution or acts of Congress for assuming it ourselves?

These are questions which must be resolved before this court can constitute itself "arbiter pontium," and assume the power of decid-

ing where and when the public necessity demands a bridge, what is a sufficient draw, or how much inconvenience to navigation will constitute a nuisance.

The complainants in these several bills, in order to show jurisdiction in the court, have stated themselves to be citizens of the State of New York. Their right to a remedy in the courts of the United States is not asserted, on account of the subject matter of the controversy, nor do they allege any peculiar jurisdiction as given to us by any act of Congress; but rest upon their personal right as citizens of another State to sue in this tribunal. It is very apparent, also, that the complainants, if not introduced as mere John Does or nominal parties (while those really contending are used as witnesses) are at least volunteers in the controversy, "*post litem motam*," who have bought the right to an expected injury for the luxury of the litigation.

Without stopping to laud this exhibition of public spirit by citizens of a neighboring State, it is plain by their own showing, that they can demand no other remedy from this court than would be administered by the tribunals of the State of New Jersey in a suit between her own citizens. A citizen of New York who purchases wharves in Newark or owns a vessel navigating to that port, has no greater right than the citizen of New Jersey. A court of chancery in New Jersey would not interfere with the course of public improvements authorized by the State, at the instance of a wharf owner on the suggestion that a change in the location of a bridge would cause a depreciation in the value of his property. This is not a result, for which (if the court can give any remedy at all,) it will interfere by injunction. The court has no power to arrest the course of public improvements, on account of their effects upon the value of property, appreciating it in one place and depreciating it in another. If special damage occurs to an individual, the law gives him a remedy. But he cannot recover either in a court of law or equity, special damage as for a common nuisance, if the erection complained of be not a nuisance. A bridge authorized by the State of New Jersey cannot be treated as a nuisance under the laws of New Jersey. That the police power of

a State includes the regulation of highways and bridges within its boundaries, has never been questioned. If the legislature have declared that bridges erected with draws of certain dimensions will not so impede the commerce of the river, as to be injurious or become a public nuisance, where can the courts of New Jersey find any authority for overruling, reversing or nullifying legislative acts on a subject matter over which it has exclusive jurisdiction? Admitting, for the sake of argument, that Congress, in the exercise of the commercial power, may regulate the height of bridges on a public river in a State below a port of entry, or may forbid their erection altogether, they have never yet assumed the exercise of such a power, nor have they by any legislative act conferred this power on the courts. The bridges will not be nuisances by the law of New Jersey. The United States has no common law offences, and has passed no statute declaring such an erection to be a nuisance. If so, a court cannot interfere by arbitrary decree either to restrain the erection of a bridge or to define its form and proportions. It is plain that these are subjects of legislative not judicial discretion. It is a power which has always heretofore been exercised by State Legislatures over rivers wholly within their jurisdiction, and where the rights of citizens of other States to navigate the river are not injured, for the sake of some special benefit to the citizens of the State exercising the power.

But it has been contended, on the authority of a dictum of my own, in *Devoe* vs. *The Penrose Ferry Bridge Company*, "that the Supreme Court have decided in the case of *Penn.* vs. *The Wheeling Bridge*, 13 How. 579, that although the courts of the United States cannot punish by indictment the erection of a nuisance on our public rivers, erected by authority of a State, yet that as courts of chancery they may interfere at the instance of an individual or corporation who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to the ports of entry within a State." 3 Amer. Law Reg. p. 83.

It is true that this doctrine was enunciated as a corollary from the Wheeling Bridge case, on a motion for an interlocutory injunc-

tion against a bridge over a stream wholly within the territory and jurisdiction of Pennsylvania. On such motions I have always refused to hear and definitely decide the great points of a case. If there be a prima facie or even doubtful case shown, it is the interest of *both parties* that the interlocutory injunction should issue, and that the defendants should not expend large sums in erections which may *possibly* be treated hereafter by the court as nuisances. In the cases now before us, the same course was pursued; but after the full argument of this question on final hearing, and a most careful consideration of it, I feel bound to acknowledge that the dictum I have just quoted from the report of the case of the Penrose Ferry Bridge Company is not supported by the decision of the Supreme Court in the Wheeling Bridge case. It is true that such an inference might be drawn from a hasty or superficial examination of the opinion of the court as delivered in that case. But the point now to be considered, was not in that case, and could not, therefore, have been decided. No judge in vindicating the judgment of the court, can deliver maxims of universal application, in every sentence, or oracles which may be read in two ways, one applicable to the case before him, and the other not. To sever the arguments of a judge from the facts of the case to which he refers, will often lead to very erroneous conclusions. The fact that Pittsburg has been made a port of entry may have been mentioned as an additional or cumulative reason why Virginia should not be allowed to license a nuisance on the Ohio, below that city. But the question whether the power to regulate bridges over navigable rivers wholly within the bounds of a State, could be exercised by it below a port of entry, and whether the establishment of such a port did *ipso facto* divest the State of such a power was not in that case, and therefore not decided. This assertion will be fully vindicated by a careful examination of the record in that case.

1. It must be noted as a circumstance of that case, that although the State of Pennsylvania in her corporate capacity was complainant, and "*propter dignitatam*" entitled to sue in the Supreme Court of the United States; yet, that when the bill was filed, the same complaint might have been sustained in the Circuit Court of

the United States, or the bridge might have been prostrated as a nuisance by indictment in the proper state court of Virginia. The bill charged that the bridge proposed to be erected was in utter disregard of the license granted by its charter, which carefully forbid the least interference with the navigation of the Ohio. On the facts charged and proved, a Court of Chancery of Virginia, would have been bound to enjoin the erection of so palpable a nuisance to the navigation. The case therefore presented every fact necessary to give the court jurisdiction—a party having a right to sue in the court—a nuisance proposed to be erected without the sanction either of Virginia or the United States, and great special damage to the plaintiff.

2. During the pendency of this suit, the Legislature of Virginia saw proper to come to the assistance of their corporation, in the unequal contest, and at its suggestion enacted that the bridge proposed to be built contrary to the license granted to the corporation, was according to it, and not therefore to be considered as a nuisance by the laws of Virginia—notwithstanding that the bridge was without a draw and for many days in the year would wholly obstruct the passage of steamboats.

3. This legislation of Virginia being pleaded as a bar to further action of the court in the case, necessarily raised these questions. Could Virginia license or authorize a nuisance on a public river, which rose in Pennsylvania, and passed along the border of Virginia, and which by compact between the States was declared to be "free and common to all the citizens of the United States?" If Virginia could authorize any obstruction at all to the channel navigation, she could stop it altogether, and divert the whole commerce of that great river from the State of Pennsylvania, and compel it to seek its outlet by the railroads and other public improvements of Virginia. If she had the sovereign right over this boundary river claimed by her, there could be no measure to her power. She would have the same right to stop its navigation altogether, as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river which

Virginia can claim. This plea therefore presented not only a great question of international law, but whether rights secured to the people of the United States, by compact made before the Constitution, were held at the mercy or caprice of every or any of the States, to which the river was a boundary. The decision of the court denied this right. The plea being insufficient as a defence, of course the complainant was entitled to a decree prostrating the bridge, which had been erected *pendente lite*. But to mitigate the apparent hardship of such a decree, if executed unconditionally, the court in the exercise of a merciful discretion, granted a stay of execution on condition that the bridge should be raised to a certain height or have a draw put in it which would permit boats to pass at all stages of the navigation. From this modification of the decree no inference can be drawn, that the courts of the United States claim authority to regulate bridges below ports of entry, and treat all State legislation in such cases as unconstitutional and void.

It is abundantly evident from this statement, that the Supreme Court, in denying the right of Virginia to exercise this absolute control, over the Ohio river, and in deciding that as a riparian proprietor she was not entitled, either by the compact, or by constitutional law, to obstruct the commerce of a supra-riparian State, had before them questions not involved in these cases and which cannot affect their decision. The Passaic river, though navigable for a few miles within the State of New Jersey, and therefore a public river, belongs wholly to that State; it is no highway to other States, no commerce passes thereon from States below the bridge to States above. Being the property of the State, and no other State having any title to interfere with her absolute dominion, she alone can regulate the harbors, wharves, ferries, or bridges, in or over it. Congress has the exclusive power to regulate commerce, but that has never been construed to include the means by which commerce is carried on within a State. Canals, turnpikes, bridges and railroads are as necessary to the commerce between and through the several States, as rivers. Yet Congress has never pretended to regulate them. When a city is made a port of entry, Congress does not thereby assume to regulate its harbor, or detract from the

sovereign rights before exercised by each State over her own public rivers. Congress may establish post offices and post roads; but this does not affect or control the absolute power of the State over its highways and bridges. If a State does not desire the accommodation of mails at certain places, and will not make roads and bridges, on which to transport them, Congress cannot compel it to do so, or require it to receive favors by compulsion. Constituting a town or city a port of entry, is an act for the convenience and benefit of such place, and its commerce; but for the sake of this benefit the constitution does not require the State to surrender her control over the harbor, or the highways leading to it, either by land or water, provided all citizens of the United States enjoy the same privileges which are enjoyed by her own.

Whether a bridge over the Passaic will injuriously affect the harbor of Newark, is a question which the people of New Jersey can best determine, and have a right to determine for themselves. If the bridges be an inconvenience to sloops and schooners navigating their port, it is no more so to others than to them. I see no reason why the State of New Jersey, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river. It would affect the rights of no other State. It would still be a port of entry, if Congress chose to continue it so. Such action would not be in conflict with any power vested in Congress. A State may, in the exercise of its reserved powers, incidentally affect subjects entrusted to Congress without any necessary collision. All railroads, canals, harbors or bridges necessarily affect the commerce not only within a State, but between the States. Congress, by conferring the privilege of a port of entry upon a town or city, does not come in conflict with the police power of a State exercised in bridging her own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads and canals, to land as well as water? Assuming the right (which I neither affirm or deny) of Congress to regulate bridges over navigable rivers below ports of entry, yet not having

done so, the courts cannot assume to themselves such a power. There is no act of Congress or rule of law which courts could apply to such a case. It is possible that courts might exercise this discretionary power as judiciously as a legislative body, yet the praise of being "a good judge" could hardly be given to one who would endeavor to "enlarge his jurisdiction" by the assumption, or rather usurpation, of such an undefined and discretionary power.

The police power to make bridges over the public rivers is as absolutely and exclusively vested in a State as the commercial power is in Congress; and no question can arise as to which is bound to give way, when exercised over the same subject matter, till a case of actual collision occurs. This is all that was decided in the case of *Wilson* vs. *The Blackbird Creek, &c.*, 2 Peters, 257. That case has been the subject of much comment, and some misconstruction. It was never intended as a retraction or modification of any thing decided in *Gibbons* vs. *Ogden*, or to deny the exclusive power of Congress to regulate commerce. Nor does the Wheeling bridge case at all conflict with either. The case of *Wilson* vs. *The Blackbird Creek, &c.*, governs this—while it has nothing in common with that of the Wheeling bridge.

The view taken by the court of this point dispenses with the necessity of an expression of opinion on the questions on which so much testimony has been accumulated, what is the proper width of draws on bridges over the Passaic? How far the public necessity requires them? What is the comparative value of the commerce passing over or under them? What the amount of inconvenience such draws may be to the navigation, and whether it is for the public interest that this should be encountered rather than the greater one consequent on the want of such bridges? and finally, the comparative merits of curved and straight lines in the construction of railroads. These questions have all been ruled by the Legislature of New Jersey, having (as we believe) the sole jurisdiction in the matter. They have used their discretion in a matter properly submitted to them, and this court has neither the power to decide, nor the disposition to say, that it has been injudiciously exercised.

II. The second great question in this case is not affected by the conditions of the first. The court has undoubted jurisdiction to administer the relief here sought, if the complainants have shown themselves entitled to it.

It is charged that the corporation called the "Proprietors of the Bridges over the rivers Passaic and Hackensack" have a right to bridge these rivers "exclusive of all other persons whatsoever, in such manner as that no other bridge can be erected within said limits, until the expiration of 99 years from the date of said original act (1790), without the consent of said Proprietors." It is contended, also, that a majority of the stockholders cannot by law surrender or release this exclusive privilege or franchise, and that any law assuming to take away or authorizing any invasion of such franchise, impairs the obligation of the original and fundamental contract with and between the stockholders, and is therefore unconstitutional and void; and as a consequence, this court having jurisdiction of the parties, is bound to protect their franchise from invasion, on the complaint of any individual stockholder.

In order to a clear understanding of this point, it will be necessary to give a brief, but, nevertheless, a somewhat tedious history of the legislative and other transactions connected with it.

Previous to the year 1790, the Passaic and Hackensack rivers had been crossed by means of ferries only. In that year the Legislature of New Jersey passed an act "for building bridges over the Passaic, Hackensack," &c. As this act is somewhat anomalous in its provisions, and subject to misconstruction, it will be necessary to notice some of its provisions. The first section nominates certain commissioners, "who are authorized to put in execution the several services intended by this act." They are required to view the ground from Newark to Powles Hook, and fix upon the most suitable and convenient site for a bridge, and are authorized to erect, or cause to be erected, a bridge over each of these rivers. The bridges must have a draw of 24 feet, lamps, &c. After having agreed upon the sites of the bridges, they are required to lay out the roads to them. If the bridge be fixed at the ferry, the commissioners were to pay for the ferry rights; they were authorized also,

at their discretion, to contract and agree with any person or persons who would undertake to build such bridges for the tolls allowed by the act; and for so many years, and upon such conditions as, in the discretion of the commissioners, should seem expedient. This agreement must be reduced to writing, signed and sealed by the parties thereto, and recorded, "and to be binding on the parties contracting as well as the State of New Jersey, and as effectual as if the same and every part, covenant and condition thereof had been particularly and expressly set forth and enacted in this law."

The 15th section enacts—"That it shall not be lawful for any person whatsoever, to erect or cause to be erected any other bridge or bridges over or across the said river Passaic, between its mouth and second river, &c."

In February, 1793, these commissioners entered into a contract, by indenture, with some thirty other gentlemen, reciting their powers under the above act. By this deed they "demised, granted, and to farm let" the said bridges to be erected "as hereinafter declared, over said rivers, together with all tolls appertaining thereto." "To have and to hold the said bridges, with their respective tolls and profits, hereinbefore mentioned, &c.," for a term of 97 years. In 1794 the stockholders in this company are constituted a body politic and corporate, by the name of the "Proprietors of the bridges over the rivers Passaic and Hackensack."

In 1832, "the act to incorporate the New Jersey Railroad Company" was passed.

As the proprietors of the bridges had claimed the sole right to build bridges over the Passaic and Hackensack on the proposed route of the railroad, the Legislature, with a laudable regard for private rights, authorized the railroad company to purchase turnpike roads and bridges on the route, or any and all the shares of the capital stock of such roads and bridges. The stockholders were to be paid the par value of their stock, or have railroad stock to the same amount. As the stockholders in the bridge company were probably the persons most interested in obtaining the railroad charter, the act did not make it compulsory on the stockholders to accept the value of their stock in money, or railroad stock, but left it to the two corporations to arrange the matter among themselves.

No difficulty appears to have been apprehended, as the railroad was authorized to purchase the stock, and thereby control the other corporations, and more especially as the wealthy and respectable men who owned the stock of the first were those most deeply interested in the last. The act, while it contemplated that the railroad corporation should have the control of both the turnpikes and bridges, did not permit the smaller corporations to be absorbed or annihilated by the greater, but ordained that the roads and bridges should be preserved and governed by the provisions of their respective charters.

Accordingly, in November, 1832, the railroad corporation entered into an agreement with the "proprietors of the bridges," reciting the authority conferred on the railroad, and that the parties had agreed upon the terms of sale of the stock of the bridge company; and stipulating that the railroad pay to the stockholders of the bridge company $150 for every share of their stock. It provided that the stockholders electing to receive payment for their stock according to this agreement, should show their assent before the first of January following, and might elect to receive money or railroad stock to same amount, reserving their "franchise privileges" as before held, and reserving also "all grants or privileges theretofore made by way of commutation."

The reservations were made to meet the exigency of the proviso to the 10th section of the act of incorporation of the railroad company—"That nothing herein contained shall be so construed as to impair any reversionary interest or vested rights which the State or any incorporated company or individual may possess in virtue of an act for building bridges, &c., passed in 1790," &c.

By this agreement the railroad is permitted either to use the old bridge or erect another along side, but so as not to obstruct, hinder, or interrupt the travel over the old bridge.

In pursuance of their act of incorporation and of their agreement, the railroad bought some 930 of the 1,000 shares into which the stock of the "proprietors of the bridges," &c., was divided, at the price of $150 for each share of $100. They erected a railroad bridge at the end of Centre street, which has been used for upwards

of twenty years. As a new bridge is now found necessary, and as the position of the old one requires sharp curves of the railroad through the streets of the city, which are not only inconvenient but dangerous, a supplement to the act incorporating the railroad was passed on the 3d of April, 1855, authorizing the construction of the bridge at Commercial Dock, and the removal of the old one at Centre street, and of the railroad track connected therewith. It requires the new bridge to have two draws, each at least 65 feet wide, on which a light must be kept at night, and a careful person to open the draws for free passage of vessels, with the same provision as to reversionary interests as is found in the 10th section of the original act. It requires also the consent of the "proprietors of bridges," &c., in writing, under the corporate seal, and that the giving of such consent shall not, except as to the said bridge so consented to, be construed, held, or deemed in any manner to strengthen or impair any rights or privileges which the said "proprietors may possess."

It is not worth while, for the purposes of this case, to inquire whether the "proprietors of the bridges," &c., can claim any franchise of greater extent than that contained and accurately defined in their written agreement with the commissioners. It clearly does not confer on them a right to build any other bridges than the two described and specified, or take tolls therefrom. They cannot be said therefore to have a monopoly for building of bridges within the boundaries specified in the act. The instrument called a lease or agreement defines the rights and the extent of the franchise granted to the company; and it may well be doubted whether the provisions of the 15th section, which are wholly omitted from their charter, can be invoked as any part of their franchise. Nevertheless, as the Legislature of New Jersey seem to have treated this section as in the nature of a covenant by the State not to permit other bridges to be erected which might injure the value of the franchise conferred on the "proprietors" by the commissioners without the consent of the corporation, we shall treat it as such—at best it is no more.

If the proprietors had the sole right to build bridges and take tolls, their whole franchise might have been condemned by the

Legislature under their right of eminent domain. A title to a franchise is of no higher quality than a title to land. Such indiscreet contracts by a legislature cannot paralyze the arm of government and stop the progress of improvement for a century. The legislature without attempting to define their rights or compelling them to renounce them for a proper consideration have merely suggested a very easy mode of getting over the difficulty. The railroad is authorized to purchase out the whole stock and franchise of the bridge company, by paying the full value thereof. Those stockholders who did not choose to accept such terms know well the purpose and object of this transaction was to give to the railroad corporation the control of this claim to a monopoly, whatever might be its validity or extent, without a destruction of the other corporate privileges and faculties.

An acquiescence for more than twenty years in the exercise of this right by the railroad will hardly leave room to question it now, even if a majority of the stockholders should now be disposed to do so. But the parties now objecting, do not seem absolutely to deny the right of the railroad company to have a bridge over the Passaic somewhere, provided it be built so as to suit the private interest of certain wharf owners. Their franchise to receive tolls and pass free on their own bridge will not be impaired by the change. Nor is there any evidence that the value of the bridge stock will be in any manner affected thereby. When the legislature have decided that the public interests require the change of location of the track of a railroad, or a bridge connected with it, a court cannot be called on to enjoin such a change because it will cause a depreciation of property adjoining it, nor can members of the bridge corporation in this case call for the intervention of the court to protect them against the acts of the majority of the corporators, unless for some abuse of power, to the injury of the corporate privileges or property of the minority. It is no part of the corporate franchise of the proprietors, &c., that any of its stockholders who may chance to be wharf owners, shall wield their corporate privileges to enhance the value of their wharves.

This change of the position of the railroad bridge is authorized by

law. It has the consent of the "proprietors," given in the manner pointed out by law, under the seal of the corporation. In giving this assent the corporation was acting within the scope of its powers, and in a case where the will of the majority must necessarily govern, when lawfully expressed. This is not a case where a majority of the stockholders are employing the common fund for the accomplishment of a purpose not within the scope of the institution. The majority must decide what is proper compensation for any real or supposed injury to their franchise of toll, which may result from the change of position of this railroad bridge.

If it be part of their franchise to license other bridges, such a franchise can only be exercised by the corporation under their common seal and at the will of a majority. But it is plain that another bridge erected without legislative authority might have been treated as a nuisance, for whatever may have been considered the nature of the supposed monopoly, neither the law, nor their own lease, authorized them to build another bridge, or to give a valid license to others. The legislature admit that they are bound by contract not to authorize another bridge; but on the principle of "*volenti non fit injuria*" they have directed the railroad to obtain the consent of the corporation with whom this contract was made; whether this covenant was made with them originally as partners or corporators, can make no difference in the case. In neither case can a single individual by his negative vote control the majority of the body, or compel it to give or refuse its consent as may suit the interest of an individual or a minority.

This supposed franchise of forbidding the Legislature from licensing a bridge over these rivers seems to have been a puzzle for the learned lawyers of the State for half a century past; and, as it is claimed by a large number of highly respectable, influential and wealthy men, it has been treated with great reverence by the Legislature, and the more so, as the lawyers could not agree in defining what it was. Some have fancied it an incorporeal hereditament in each stockholder, which cannot be affected by the act of another, having the quality of a polypus; and though divided into one thousand parts or pieces, each one became a unit, or

distinct whole; others have treated it as a right of common, in which "*quilibet totum habet et nihil habet*," an indivisible unit of which, if a man has not the whole, he has nothing—and consequently a majority cannot dispose of it. But we do not think it necessary to search the lumber garret of obsolete law, in order to give a show of profound legal learning to an absurd conclusion. The provisos in the different acts of Legislature, which have been invoked as conferring this power of obstruction on each one of one thousand partners or stockholders, make no new grant of power or franchise, and clearly refer to other valuable privileges, without being open to such misconstruction.

Having, then, such evidence of the consent of the corporation as is required by law, we cannot say it is insufficient. The allegations in the bill, of irregularity or fraud in the election of the officers of the corporation, and obtaining the act giving such consent, even if sufficiently pleaded, have not been proved, and require no further notice.

I am of opinion, therefore, on this point of the case, that the complainants have shown no legal right as stockholders of the corporation of "proprietors," &c,, to interfere and overrule the act of the corporation.

Nor have they alleged or shown such an improper use of the common property of the corporation, or such deviation from its original purpose, or abuse of the trusts confided to it, as will entitle them to the interference of a court of equity.

The third and last question for consideration, is, whether the railroad company has, by any valid contract, covenanted or agreed with the complainant, or those under whom they claim as assignees, that the railroad bridge over the Passaic shall be forever fixed at Centre street, so that the company cannot, even with consent of the Legislature, and for their own and the public benefit, change the location of the bridge, shorten their road, and avoid difficult and dangerous curves.

As we have already seen the question of the expediency or necessity for this change of route on the road, is one not submitted to the judgment or discretion of the court. If the Legislature has

authorized it, the railroad have a right to proceed, unless bound by contract to maintain their bridge where it at present stands. The answer denies the existence of any such contract.

Assuming that a contract which is to have the effect of forever restraining the improvement of this road at this point can be proved by parol, those who aver it, must be held to clear, consistent, and undoubted evidence, as to the parties, the consideration and the precise terms of such contract. Have we such proof?

Without wishing to make any remarks which may appear offensive to any of the highly respectable witnesses who have given such contradictory accounts of the transaction, it is too plain to be overlooked, that much of this conflict arises from the examination of persons as witnesses who are the real parties in interest. The transfer made *post litem motam* in order to constitute the complainant a party to the suit, is a veil too transparent to conceal the real parties to the litigation.

But waiving this objection to the testimony of certain witnesses, as also any invidious comparison of the credibility of very respectable men, I must say that there is not such clear evidence of a contract, its consideration, its parties or its terms, as would justify a court in decreeing its specific execution.

It appears that originally the railroad company had purchased the Commercial Dock property, with the view of erecting their bridge there. As the town of Newark was then built, the railroad would pass along its lower boundary. At this time railroads were an untried experiment. It was a popular notion that it would be of great advantage to a town or city to have a railroad pass through its most frequented streets, that it would advance the value of property on the streets through which it passed, and increase their commerce; and that curves in a railroad were preferable to straight lines, being much more graceful and no less useful.

From the prevalence of these notions, the popular feeling became much excited; and the more so, that certain individuals of wealth and influence, who owned wharves on the river, had shrewdly discovered that it would add considerably to the value of their property, if the railroad instead of crossing below it, could be bent round behind it, and crossing above, create an obstruction to the naviga-

tion of the river above their wharves. Public meetings were held, exhorting, entreating, and advising the railroad directors.—Suits were brought by lot-holders in the name of the Attorney General, threatening them with injunctions. Some wanted one thing, some another, and the result is perhaps best described in the graphic language of one of the witnesses:

"I can only say, that according to my recollection now, there was much confusion and conflict of wishes among all the parties, and I don't know how many parties I could count up. I know there were sharp speeches and feelings exhibited, as much so as upon any thing I ever saw in this town, and to my view at the present moment, they were like two dogs that had been quarreling, until they got tired and left off, and there was a sort of a common consent to abandon the conflict, and not to keep the progress of the work from going on, by a general assent of making the bridge, where it is now. The location of the bridge was the result, but that there was any contract or agreement that was to be final and conclusive and not to be revoked, I know no such arrangement as that. There was a cessation of the conflict and the work went on."

The directors, desirous of conciliating the people of Newark, and expediting the completion of their road, yielded to the pressure, and passed the following resolution, which had the effect of allaying the excitement. It is dated on the 24th of September, 1834, and is as follows:

"*Whereas*, considerable diversity of opinion has prevailed among the citizens of Newark relative to the location of the railroad bridge across the Passaic river, and the location mentioned in the annexed resolution having been agreed upon as a mutual accommodation of conflicting interests, and with a view to the settlement of all matters of controversy; now, therefore, be it

"*Resolved*, unanimously, that the railroad bridge be located across the Passaic river at the north end of the dock owned by Moses Dodd, with a draw of forty-five feet in width; provided that the right of way from the westerly termination of said bridge, to the entrance of the avenue on Market street can be obtained on reasonable terms; and provided also, that the owners of property on the above mentioned part of the route of the railroad shall agree that the company may use any moving power thereon which they shall deem proper."

And on the 26th of December, the following resolution was passed:

"*Whereas*, it is desirable that the bridge across the Passaic river be definitely located, and whereas further delay, in order that all difficulties may be removed, is not deemed expedient, therefore—

Resolved, That the bridge across the Passaic river be, and the same is, hereby definitely located, immediately north of the dock lately owned by Moses Dodd."

These resolutions of the board, for the purpose of proposing an accommodation of conflicting interests and putting an end to the controversy, seem to have brought the dispute to a close, and received general aquiescence. But these documents exhibit no contract, binding the corporation never to change the location of the road and bridge under any change of circumstances. They accordingly retained the Commercial Dock property, which was originally purchased for the purpose of a bridge. This proposition and resolution of the board was for the sake of peace. Those without had conflicting interests—they were bound to no conditions, they gave no consideration, except "*ceasing to quarrel when they got tired.*" Even the parties who had brought suits to frighten the directors where not bound to withdraw them. The directors exercised their own discretion under the circumstances. But time, which changes all things, has produced a great change in the circumstances.—Newark has become a great city. Locomotives moving at a velocity of forty miles an hour, which were then considered but the dream of the projectors, are now established facts. Curves have given way to straight lines, and the notion that railroad cars darting through the most frequented streets of a city are neither a convenience nor a benefit, has become obsolete. The conflicting interests which inexperience and ignorance had originally produced, need no longer to be propitiated for the sake of peace. The people of Newark no longer object to having the bridge located where it was originally intended to place it, and the people of New Jersey, by their Legislature, have determined that it would be beneficial to the public to have the old bridge, with its narrow and troublesome draws, taken away, a new one erected below with larger and better draws, and that the railroad should pass through the city by the shortest route—by a straight line, and not with short curves.

The complainants have shown no contract made by themselves with the railroad company, nor have they shown any covenant running with the land on which they as assignees are entitled to a remedy at law, or relief in equity.

Having thus disposed of the three great points so ably discussed

by the learned counsel, the minor issues of fact or law have become immaterial, and need no further notice.

Let a decree be entered in each of these cases dismissing the bill, with costs.

In the Circuit Court of the United States, Northern District of Ohio—July Term, 1857.

GEORGE S. COE, TRUSTEE vs. PENNOCK & HART, AND THE CLEVELAND, ZANESVILLE AND CINCINNATI RAILROAD.

1. A mortgage given on the entire property of a railroad, including future receipts for transportation, with an agreement that property on the road subsequently acquired, shall be bound, and a conveyance of it be duly executed, gives an equitable lien on property subsequently acquired, to the bondholders of bonds secured by the mortgage.
2. A charter must be construed according to the intent of the legislature, if such intent can be ascertained, by the language used.
3. A person who constructs cars, or other rolling stock, for a railroad, if he deliver the stock to the company, without any special provision to receive the payment, can claim no lien on the work. He may effect this lien while the work is in his possession. And if he obtain a judgment against the company for the work, an execution cannot be levied on the rolling stock on which a former lien exists.
4. Where there are liens on the property of a railroad company, the liens must be adjusted in chancery, where each claimant shall receive his proportionate share of the proceeds. The appointment of a receiver is generally ruinous, and a sale of such property should not be made, under a reasonable prospect of payment, by a faithful application of the profits of the road.

Messrs. *Otis* and *Weyman*, for complainant.
Messrs. *Spalding* and *Parsons*, for respondents.

The opinion of the court was delivered by

McLEAN, J.—The questions arise in this case on a motion to dissolve an injunction which had been granted, to stay an execution on a judgment at law.

The bill states that the Cleveland, Zanesville and Cincinnati Railroad Company, a body corporate and politic, created by the laws of Ohio, and having its principal place of business at Akron, in